November 4, 2010

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th St. SW
Washington, DC 20554

Re: Applications of Comcast Corporation, General Electric Company and NBC Universal, Inc. for Consent to Assign Licenses or Transfer Control of Licensees, MB Docket No. 10-56

Dear Ms. Dortch:

Yesterday, John Bergmayer and Harold Feld of Public Knowledge (PK) met separately with Rosemary Harold of Commissioner McDowell's office, Rekha Chandrasekher, Louis Peraertz, Dave Grimaldi, and Angie Kronenberg of Commissioner Clyburn's office, and Joel Rabinovitz, Jim Bird, Deborah Broderson, John Flynn, Marcia Glauberman, Diana Sokolow, and Jonathan Baker of the Comcast/NBCU transaction team, with regard to the above captioned proceeding.

First, PK emphasized that this is a broadcasting transaction. While all merger applicants "have the burden of proving, by a preponderance of the evidence, that the proposed transactions, on balance, serve the public interest,"[1] the FCC has a particular responsibility in the context of broadcast regulation to promote diversity and ensure that those holding valuable broadcast licenses for free use these licenses to serve the public interest – subject to the "rational basis" rather than "intermediate scrutiny" standard of review.[2] When a cable operator voluntarily seeks to move into the broadcasting world, benefiting from free use of public spectrum as opposed to relying on its own capital investment, it willingly assumes these greater responsibilities.

This merger represents the first significant cable/broadcast cross-ownership, and at a time when internet video distribution is at last beginning to show promise as a potential competitor for existing systems. Accordingly, the Commission's responsibility to regulate broadcast licenses in the public interest require it to consider how the unique combination in this merger requires significant conditions to promote competition and diversity of media voices as required by the Communications Act.[3] In this case, PK discussed three specific issues and possible conditions. (1) Access to programming for rival MVPDs, including programming currently covered by the program access rules, which expire in 2012; (2) Retransmission consent and the ability to leverage retrans in an anticompetitive fashion; (3) Access to programming online.

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[1] Applications for Consent to the Assignment and/or Transfer of Control of Licenses, *Memorandum Opinion & Order*, 21 FCC Rcd, 8203, ¶ 4 (Adelphia order).

[2] For instance, when reviewing the Commission's newspaper/broadcasting cross-ownership rules, the Supreme Court used a standard of review appropriate for the broadcasting industry, even though the rules also affected the interests of newspaper owners. *See FCC v. National Citizens Comm. for Broadcasting*, 436 US 775, 799-800 (1978).

[3] *See* 47 U.S.C. §257(b).

Access to Programming/Retrans

There is no doubt that the combination of Comcast's existing programming with NBC's local and cable programming constitutes "must have" programming. When the program access rules expire in 2012, competing MVPDs will be vulnerable to discriminatory pricing. Worse, as demonstrated by the recent Fox/Cablevision dispute, Comcast-NBC would be able to leverage retrans negotiations over its broadcast signal as a means of circumventing the existing program access rules. Because Congress created the retransmission consent process when cable/broadcast cross-ownership was prohibited by statute, it is certain that Congress never intended to allow an incumbent cable operator to use the retransmission consent process to advantage itself against rival MVPDs. That Congress subsequently passed the ban on exclusive retransmission consent agreements in 1999 indicates that Congress was concerned with the ability of incumbent cable operators to abuse the retransmission process even through indirect means. The Commission should impose retrans-specific conditions to ensure that the merged entity does not frustrate the intent of the Act.

Accordingly, the Commission should require that Comcast-NBC remain subject to the program access rules after they expire, and that this condition would include access to the broadcast signal as well as to non-broadcast programming. Ideally, this condition should require mandatory baseball-style arbitration rather than a full hearing. In addition, Comcast-NBC's broadcast programming should be subject to the good faith negotiation standard of Section 628 rather than that of Section 325. Furthermore, Comcast-NBC should be required to make its programming (including its broadcast signal) available for retransmission during the pendency of any program access or retransmission dispute. In addition, to the extent Comcast-NBC has chosen to make any content available online prior to the program access/retrans dispute, Comcast-NBC should be prohibited from blocking access to that content, withdrawing the content, or otherwise changing the way in which broadband subscribers can access the programming.

Online Video

The Commission has long contemplated the emergence of online distribution of video as a means of promoting competition and diversity of media voices. With the availability of over-the-top video providers, and devices designed to facilitate watching internet video on television, this is now possible. The combined Comcast-NBC, however, would have the capacity and incentive to stifle the emergence of online video as a potential competitor. By acquiring NBC, Comcast will remove from the marketplace one of the few broadcaster networks experimenting with online distribution through services such as Hulu. Further, combining the largest provider of residential broadband access, the largest MVPD, one of the top four networks, and major studio production assets under s single roof would make it impossible for a potential video distribution rival to survive without the permission of the merged entity.

The FCC should therefore require that Comcast-NBC make its programming available to online programming distributors under the same terms and conditions that it makes that programming available to traditional MVPDs. Further, the FCC should prohibit Comcast-NBC from blocking access to any online content on the basis of the browser, device, or application seeking access to the content.

This ex parte is submitted in compliance with Section 1.1206(b) of the Commission's Rules. If you have any questions, please contact me at 202-681-0020.

Respectfully submitted,

/s/Harold Feld
Legal Director

cc:

Sherrese Smith	Rekha Chandrasekher	Deborah Broderson
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Rosemary C. Harold	Angie Kronenberg	Marcia Glauberman
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